84-1452

No. 84-

Office - Supreme Court, U.S.
FILED
MAR 14 1985
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WISCONSIN'S ENVIRONMENTAL DECADE, INC. and PETER ANDERSON,

Petitioners,

v.

STATE BAR OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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54 pp

QUESTIONS PRESENTED*

1. May a civil rights complaint based on the First Amendment be dismissed by a federal court on ripeness grounds where (a) the state has made a final decision to bring a quasi-criminal proceeding against the plaintiffs and advised them of that intention; (b) nothing remains to be done before the state commences that proceeding; (c) there are no facts in dispute; and (d) under the rule announced in *Younger v. Harris,* 401 U.S. 37 (1971), the effect of the dismissal will be to require plaintiffs to litigate their constitutional claims solely as a defense in the state proceeding?

2. May a state, consistent with the First Amendment rights to associate and to petition the government for redress of grievances, forbid a non-profit organization from having its interests and those of its members represented by a non-lawyer in adjudicatory proceedings before a state administrative agency whose rules specifically authorize lay representation, on the grounds that such representation constitutes the unauthorized practice of law?

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*There were no other parties to this proceeding in the court below. The seven individual members of respondent's Committee on the Unauthorized Practice of Law were defendants in the district court, but they were dismisssed by stipulation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WISCONSIN'S ENVIRONMENTAL DECADE, INC. and PETER ANDERSON,

Petitioners,

v.

STATE BAR OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Wisconsin's Environmental Decade, Inc. and Peter Anderson hereby petition this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 747 F.2d 407, and appears in the appendix to this petition at pages 1a-11a. The opinion and order of the United States District Court for the Western District of Wisconsin is unreported; it is reproduced in the appendix at pages 12a-20a. The opinion and order in a prior action between these parties in the United States District Court for the Western District of Wisconsin (No. 77-C-184) is also not reported and is reproduced in the appendix at pages 21a-30a.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1984 (31a). On November 13, 1984, a timely petition for rehearing, with suggestion for rehearing in banc was filed, and on December 17, 1984, the petition was denied without opinion (32a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of Title 42 (1982) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1970, petitioner Peter Anderson and others joined together to form petitioner Wisconsin's Environmental

Decade Inc. (the "Decade"), a non-profit membership organization whose purpose is to enhance and protect the quality of the environment. Petitioners recognized that, in order to achieve their goals, it would be necessary to participate in quasi-judicial proceedings before the Wisconsin Public Service Commission (the "Commission"), which regulates the provision of electric power in Wisconsin and therefore makes numerous decisions which have a substantial effect on the environment.

Petitioners also recognized that, however desirable it might have been to hire an attorney to represent the Decade in such proceedings, the organization simply could not afford one, since its total annual budget in the years 1971-1977 averaged $7500. It had also tried without success to obtain a *pro bono* lawyer to represent it before the Commission. However, section 2.32(1) of the Commission's rules, Wisc. Admin. Code, specifically authorizes lay representation in quasi-judicial proceedings. Therefore, the board of the Decade decided to have petitioner Anderson, who was then and remains today the Decade's highest ranking employee, appear on its behalf even though he was not an attorney. As a result, he has participated in more than fifty adjudicatory proceedings before the Commission where he has engaged in all of the activities that a lawyer might, from filing petitions and memoranda of law, to making oral arguments and examining and cross-examining witnesses.

Despite the Commission's long-standing practice allowing lay representation, the respondent State Bar of Wisconsin advised petitioners in September 1973 that Mr. Anderson's activities before the Commission constituted the unauthorized practice of law. Under Wisconsin law, respondent could have immediately commenced a *quo warranto* proceeding, which could result in an injunction,

a fine of $2500, and the possibility of criminal sanctions, including imprisonment. However, for nearly four years, respondent took no legal action against petitioners, although it continued to threaten to do so.

Because of this cloud hanging over their heads, and because of their awareness that once respondent brought a state court proceeding, this Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), would foreclose their right to litigate their constitutional claims in federal court, petitioners filed suit in the United States District Court for the Western District of Wisconsin in May 1977 against respondent and others. That action sought declaratory and injunctive relief to prevent respondent from bringing a state court action to enforce its claim that petitioner Anderson was engaging in the unauthorized practice of law. The complaint alleged that because the Commission, as well as the Decade, its Board, and its members, specifically approved lay representation, any such enforcement would infringe petitioners' rights to petition the government and to associate together, as protected by the First Amendment and 42 U.S.C. § 1983. Jurisdiction was based on 28 U.S.C. § 1331 and 1343(3).

Petitioners moved for a preliminary injunction, and respondent moved to dismiss on a variety of grounds, including lack of ripeness. In August 1978, the district court dismissed the complaint on the ground that, because respondent had not reached a final decision on whether to initiate proceedings against petitioner Anderson, the case was not yet ripe. In recognition of petitioners' right to have a federal court decide their federal questions, and of the problems created by *Younger* (29a, n.3), the court conditioned its dismissal on respondent's representation that it would give petitioners reasonable notice before taking any enforcement action (28a-29a).

More than a year and a half later, respondent reached a final determination that the activities of petitioner Anderson constituted the unauthorized practice of law and gave petitioners the notice required by the district court. Petitioners then filed this action on April 14, 1980, making substantially the same allegations that they had made in the prior action. In its answer respondent admitted almost all of the facts alleged, but contended that the complaint failed to state a claim for relief and urged the district court to abstain to allow the state courts to decide what respondent asserted were controlling state law issues.

While petitioners did not believe that abstention was required, they recognized that the court had left the issue open in the prior case (27a, n.2). They also knew that if abstention were ordered, the case would have to proceed through two courts before reaching the Wisconsin Supreme Court, which had previously held in *Wisconsin ex rel. State Bar v. Keller,* 16 Wis.2d 377, 114 N.W.2d 796 (1962), that lay representation in adjudicatory proceedings before administrative agencies constitutes the unauthorized practice of law under Wisconsin law. Nonetheless, in order to avoid litigation over the abstention issue and to prevent a lengthy detour through the Wisconsin courts, petitioners agreed to support a petition to be filed by respondent with the Wisconsin Supreme Court, asking that Court to resolve the state law issues. In exchange, respondent agreed that if that Court did not accept the petition, respondent would not ask the federal courts to abstain. When the Wisconsin Court declined to hear the petition, the case returned to the district court.[1]

[1]The Bar subsequently requested the Wisconsin Supreme Court to amend its unauthorized practice rules to substantially eliminate the restrictions on lay representation before administrative agencies, but the Court rejected that petition as well.

After completing discovery, the parties entered a detailed stipulation, which fully described the relevant facts and made it clear that but for the filing of this action, respondent would have commenced proceedings against petitioners in the Wisconsin courts.[2] This stipulation, together with the deposition of petitioner Anderson, formed the basis for cross-motions for summary judgment on the merits of petitioners' First Amendment claims, which were based primarily on this Court's decisions in *NAACP v. Button,* 371 U.S. 415 (1963), and *In re Primus,* 436 U.S. 412 (1978). On July 20, 1983, the district court issued an opinion and order dismissing the complaint on jurisdictional grounds. Although respondent had raised no such defense, the court concluded that petitioners' claims were not ripe because, despite respondent's final decision to commence proceedings against Mr. Anderson, it found an insufficient threat of immediate harm to petitioners to constitute an actual controversy in which the federal courts could properly intervene (18a-19a).[3]

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[2]The facts relating to petitioners' activities had changed since the prior litigation in only one respect. Beginning in 1980, the Decade's income began to increase substantially so that, while there were additional funds from which the salary of an attorney to represent the Decade before the Commission could have been paid, the Decade's board decided not to allocate its funds for that purpose because it believed that the present allocation of its resources, which focused on grassroots activities, was the most effective means of promoting its goal of enhancing the environment.

[3]The court also ruled that it lacked subject matter jurisdiction because the First Amendment claim was merely a defense to a possible state court proceeding and hence did not "arise under" federal law for purposes of 28 U.S.C. § 1331 (19a-20a). That issue was fully argued in the court of appeals, as was the failure of the district court to discuss the other jurisdictional basis for this action, 28 U.S.C. § 1343(3). The fact that the court of appeals did not rule on this threshold question strongly suggests that it disagreed with the district court. Thus, if it thought that there was no subject matter jurisdiction, there was no

(continued)

In an opinion written by Senior District Judge Weigel of the Northern District of California, and concurred in by Circuit Judges Bauer and Wood, the court of appeals affirmed the ripeness ruling, finding that the "controversy lacks the degree of immediacy requisite for adjudication by a federal court" (9a). Even though respondent had formally advised petitioners of its intention to commence a state court proceeding, the court speculated that the Attorney General, who has represented respondent throughout these proceedings, including on its petition to the Wisconsin Supreme Court asking it to decide the state law issues, might decide not to bring suit. And, although it was undisputed that respondent itself could sue if the Attorney General declined, the court said that possibility was too remote to justify passing on the merits of petitioners' constitutional claims (7a-8a). The court further noted that the Wisconsin courts might decide that petitioners' conduct did not constitute the unauthorized practice of law (9a), even though any such possibility relates only to the question of abstention, not ripeness. *See Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 506-09 (1972). A petition for rehearing, limited solely to the ripeness question and focusing on the problems created by the interface between the panel's ruling and this Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), was denied without opinion.

REASONS FOR GRANTING THE WRIT

1. The first question presents an important issue on which this Court has not yet ruled, but on which all of its pertinent decisions point toward reversal: can a First

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basis for deciding ripeness, and it would have made it clear to the parties that the doors to the federal courts were permanently closed, and not simply left ajar until petitioners' claim became ripe.

Amendment complaint be dismissed by a federal court on the ground that the case is not ripe, where (a) the state has made a final decision to commence a quasi-criminal proceeding against the plaintiffs and advised them of that intention; (b) nothing remains to be done before the state commences that proceeding; (c) the parties have stipulated to all the relevant facts and the defendant has not raised ripeness as a defense; and (d) the effect of the dismissal will be to require the plaintiffs to litigate their First Amendment claims as a defense to a state court proceeding because of the application of *Younger v. Harris, supra.* Stated another way, does this Court's decision in *Steffel v. Thompson,* 415 U.S. 452 (1974), require that federal courts provide declaratory relief to a civil rights plaintiff who is facing an imminent state court enforcement action and wishes to litigate his constitutional claims in federal court?

The principal purpose of the ripeness doctrine is to avoid premature decisions on important questions. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967). But a court may not dismiss a declaratory judgment action on ripeness grounds except when there is some basis found in the Article III "case or controversy" requirement, principally where the facts are not fully developed (not an issue in this case), or where the threat of harm is not sufficiently immediate to warrant the exercise of federal judicial power. Thus, this Court has held that a pre-enforcement challenge to a state statute was ripe, in circumstances no more compelling than these, where there had been no showing of probable prosecution, because the fear of prosecution was not "imaginary or wholly speculative" and the state had "not disavowed any intention of invoking" the statute. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302 (1979).

In determining whether a claimed civil rights violation based on a potential state court enforcement proceeding is sufficiently ripe for adjudication, this Court has recognized that, because of the door-closing effects of *Younger*, only a "general threat of enforcement" – not the actual commencement of a proceeding – is required. *Steffel v. Thompson, supra,* 418 U.S. at 475. Despite the fact that here neither respondent nor the district court identified any step which remained to be taken, other than the actual filing of a state court action, the court of appeals found that this case was premature because it speculated that the Attorney General, who ordinarily but not invariably brings such actions on behalf of respondent when requested to do so, might refuse to file suit. It made this finding despite the fact that the Attorney General has represented respondent in these proceedings from the outset and vigorously argued the applicability of Wisconsin's unauthorized practice restrictions to this very case. In doing so, the court also disregarded the undisputed fact that the only reason that no action had been brought after March 1980, when respondent reached a final decision to proceed against petitioners, is that it was precluded from doing so by the condition imposed on it by the district court when the prior action was dismissed. Moreover, the court of appeals' rationale is directly contrary to this Court's ruling in *Abbott Laboratories, supra,* where a similar objection was summarily rejected with an observation that is equally pertinent here: "there is no representation that the Attorney General and the Commissioner disagree in this area; the Justice Department is defending this very suit." 387 U.S. at 152 (Harlan, J.).

Other decisions of this Court also strongly suggest that the court of appeals incorrectly determined that this case was not ripe. In *Patsy v. Board of Regents,* 457 U.S. 496

(1982), which, like *Younger,* was not cited by the court of appeals, this Court held that section 1983 actions such as this could be brought in a federal court without regard for the fact that the same relief might be obtained through a state administrative agency. However, the effect of the decision below would, in conjunction with *Younger,* require petitioners to litigate their constitutional claims through three levels of Wisconsin state courts, and then enter the federal system only by seeking review in this Court. Furthermore, in *Patsy* this Court observed, in language directly relevant to this action, that section 1983 directs federal courts to play "a paramount role in protecting constitutional rights" and that it was intended to enable a plaintiff "to choose the forum in which to seek relief." *Id.* at 503, 506. *See also Mitchum v. Foster,* 407 U.S. 225, 242 (1972) ("very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . .").

Because of the fact-bound nature of ripeness claims, no other court of appeals has been presented with precisely this question. However, other circuits which have faced similar ripeness problems have been far more sensitive to the *Younger* problem and have allowed actions such as this to proceed. *See, e.g., KVUE, Inc. v. Moore,* 709 F.2d 922, 928 (5th Cir. 1983), *aff'd sub nom. Texas v. KVUE-TV, Inc.,* 104 S. Ct. 1580 (1984) (recognizing *Younger* problem and allowing suit in "narrow door between prematurity and exclusive state jurisdiction"); *Hejira Corp. v. MacFarlane,* 660 F.2d 1356, 1360 (10th Cir. 1981); *WXYZ, Inc. v. Head,* 658 F.2d 420, 423 (6th Cir. 1981). Or, as the Fifth Circuit observed in allowing a section 1983 action similar to this to proceed, where there had been a prior informal agreement by the district attorney to warn the plaintiff if its films were considered obscene,

these actions play a "vital role" in our system, and the federal courts should not be "hostile to anticipatory constitutional challenges" to state enforcement proceedings. *Septum, Inc. v. Keller,* 614 F.2d 456, 459, *cert. denied,* 449 U.S. 992 (1980). Furthermore, those decisions, unlike that of the Seventh Circuit in this case, adhere to this Court's admonition in *Wooley v. Maynard,* 430 U.S. 705, 712 n.9 (1977), in which it rejected arguments similar to those sustained below: "If the totality of appellants' arguments were accepted, a § 1983 action could never be brought to enjoin state criminal prosecutions."

If allowed to stand, this ruling will create a new invitation to federal courts to avoid difficult constitutional questions by finding that they are not ripe, for reasons similar to those relied on by the lower courts. In addition, the decision of the Seventh Circuit effectively eliminates petitioners' section 1983 right to litigate their First Amendment claims in federal court, a right which this Court has repeatedly said was conferred on them by Congress. Therefore, this Court should grant certiorari to consider this important question, which has been answered below in a way contrary to the prior decisions of this Court and other courts that have been presented with similar questions.

2. The second question presented raises important issues as to the scope of the First Amendment rights to petition the government for redress of grievances and to associate together, as enunciated in *NAACP v. Button,* 371 U.S 415 (1963) and its progeny, and *In re Primus,* 436 U.S. 412 (1978). This Court has discretion to decide this question, *see Singleton v. Wulff,* 428 U.S. 106, 121 (1976), and should do so for several reasons. There are no disputed issues of fact, both sides moved for summary judg-

ment, the dispute has existed since 1973, and it has been in and out of the federal courts since 1977. A remand would simply postpone the date of decision and increase the work for everyone, a fact undoubtedly recognized by respondent when it agreed below that, if the Seventh Circuit reversed the district court's jurisdictional rulings, it should decide the merits rather than remand the case.

Respondent has never disputed that petitioners' First Amendment rights are at stake. Its argument below was that the state's right to license attorneys overrides those rights. However, its reasons are set forth in only the most general terms and thus do not meet the exacting standards required by this Court when a state's regulation is challenged under the First Amendment.[4] In its brief in the Seventh Circuit, respondent was somewhat more specific, pointing to the possible disruption of Commission proceedings if lay representation were allowed to continue.

The major difficulty with respondent's position is that neither the Commission nor any member of the Decade — the principal persons upon whom the acts of unauthorized practice would have the most serious consequences — has ever raised any objection to petitioners' activities. This fact distinguishes this case from those in which First

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[4]In its petition to the Wisconsin Supreme Court, the Bar relied on "the hazards of unskilled and/or unauthorized practice of law by those who have not met the educational and moral standards and who are not subject to the ethical standards of disciplinary regulations required for those licensed to practice the profession of law" (¶ 15). Paragraph 7 also mentioned "the object of protecting the administration of justice from the evils that attend unauthorized practice of law." For an excellent discussion of the rationales for unauthorized practice rules and a critical analysis of them, *see* Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 Stan. L. Rev. 1 (1981).

Amendment suits attempting to establish the right of lay representation were rejected because the court or agency in which such representation was sought objected to appearances by non-lawyers. *See, e.g., Turner v. American Bar Ass'n,* 407 F. Supp. 451, 478-79 (N.D. Tex. 1975). Here, by contrast, the Commission not only does not object, but is affirmatively desirous of having lay representatives such as Mr. Anderson appear in adjudicatory proceedings before it. Thus, at least as applied in the context of a willing agency such as the Commission, the restriction on lay representation violates the First Amendment.

While no court of appeals has specifically ruled on this question, two district court decisions, one allowing a corporation's sole stockholder to represent it in a bankruptcy reorganization proceeding,[5] and another setting aside a law allowing only licensed physicians to engage in acupuncture,[6] demonstrate that the justifications offered by respondent for restricting petitioners' First Amendment rights cannot withstand the scrutiny required by this Court's First Amendment decisions. Moreover, as recent rulings of this Court make clear, the First Amendment strictly limits the right of a state to tell membership organizations like the Decade how to run their affairs. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980); *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 123-24 (1981). Accordingly, this Court should grant review to decide the important First Amendment question presented on the scope of the rights to petition and to associate in the context of restrictions on lay representation before willing state administrative agencies.

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[5] *Matter of Holliday's Tax Services, Inc.,* 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd,* 614 F.2d 1287 (2d Cir. 1979).

[6] *Andrews v. Ballard,* 498 F. Supp. 1038 (S.D. Tex. 1980).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 1985

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2582

WISCONSIN'S ENVIRONMENTAL DECADE, INC., and PETER ANDERSON,

Plaintiffs-Appellants,

v.

STATE BAR OF WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 80 C-162-S—John C. Shabaz, *Judge.*

ARGUED APRIL 20, 1984—DECIDED OCTOBER 30, 1984

Before BAUER and WOOD, *Circuit Judges*, and WEIGEL, *Senior District Judge.**

WEIGEL, *Senior District Judge.* Wisconsin's Environmental Decade, Inc. ("Decade"), a not-for-profit Wisconsin corporation, and Peter Anderson, one of Decade's two co-directors, appeal from the judgment of the district court dismissing their action for declaratory and injunctive relief. Decade and Anderson requested the court to declare that Anderson, a non-lawyer, has a right guaranteed

* The Honorable Stanley A. Weigel, Senior United States District Judge for the Northern District of California, sitting by designation.

by the First Amendment to engage in certain advocacy activities without regard to Wisconsin rules prohibiting the unauthorized practice of law. The district court dismissed the action on the grounds that the matter was not sufficiently ripe to constitute a justiciable case or controversy and that it did not arise under federal law. Without reaching the second of these grounds, we affirm.

The relevant background facts were stipulated below for purposes of cross-motions for summary judgment. Appellant Decade has been organized and operated since 1971 for purposes of protecting and enhancing the quality of the environment. The corporate objective is pursued by means of distribution of printed materials designed to inform the public about environmental issues, lobbying before the Wisconsin state legislature, and participation in judicial and administrative proceedings which may in Decade's judgment affect the quality of the environment.

Appellant Peter Anderson was one of two co-founders of Decade. He has served as an officer and director of Decade and as a member of Decade's Executive Committee. Presently he serves as one of two co-directors of the corporation. In that capacity, he regularly appears on behalf of Decade in administrative proceedings before the Public Service Commission of Wisconsin ("PSC"). In the context of these appearances, Anderson files petitions, motions, memoranda, briefs and other pleadings, examines witnesses, and advances oral arguments in support of positions taken by Decade. Anderson has participated in this manner in more than fifty PSC proceedings since March, 1972, always on behalf of Decade.

Anderson is not an attorney licensed to practice law in Wisconsin or any other state. In appearing before the PSC, Anderson has relied upon administrative rules and practices which he and Decade maintain demonstrate PSC approval of lay representation.[1] So far as the record

[1] The specific rule relied upon is Wis. Admin. Code § P.S.C. 2.32 (1982), which provides:

(Footnote continued on following page)

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shows, the PSC has never refused to allow Anderson to appear in its proceedings or formally objected to Anderson's continued representation of Decade.

In a letter dated September 24, 1973, the Unauthorized Practice Committee of the State Bar of Wisconsin advised Anderson that, in the opinion of the Committee, Anderson's activities on behalf of Decade before the PSC constitute the unauthorized practice of law. Decade and Anderson then filed suit in federal district court, naming the State Bar of Wisconsin and ten individual Bar officials as defendants. The complaint requested declaratory and injunctive relief to prevent these defendants from interfering or threatening to interfere with plaintiffs' alleged First Amendment rights by enforcing against plaintiffs Wisconsin's prohibition of the unauthorized practice of law. By order of August 29, 1979, the district court, Honorable James E. Doyle, presiding, dismissed this complaint, concluding that the claims presented were not ripe for decision in the absence of any immediate threat of enforcement of the challenged prohibition.

On March 8, 1980, the Board of Governors of the State Bar of Wisconsin approved a recommendation of the Unauthorized Practice Committee that legal action be brought against Anderson and others based on their unauthorized practice of law in the course of administrative proceedings. The Board directed that the matter be referred to the state attorney general for prosecution; the record does not indicate whether the matter was actually so referred. On April 14, 1980, prior to any action by

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[1] *continued*

> Appearances. (1) A person desiring to participate in a proceeding, whether on his own or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his or her name and address and the name of any party he or she represents and in what capacity he or she is employed by such party.

See also State ex rel. State Bar of Wisconsin v. Keller, 16 Wis.2d 377, 114 N.W.2d 796, 800-01 (1962), *vacated*, 374 U.S. 102 (1963).

the attorney general, Decade and Anderson commenced this case by filing a new complaint in federal district court, naming as defendants the State Bar of Wisconsin and nine individual members of the Bar's Unauthorized Practice Committee.[2]

In this complaint, plaintiffs recite the circumstances summarized above, and request the court to (1) declare that the actions of the defendants "violate plaintiffs' rights secured by the First and Fourteenth Amendments of the Constitution;" (2) enjoin the defendants from initiating any proceeding against Anderson or Decade charging them with engaging in the unauthorized practice of law; and (3) enjoin defendants from stating to the PSC, the attorney general, or anyone else that Anderson or Decade is engaged in the unauthorized practice of law. By stipulation, proceedings were stayed while defendants petitioned for leave to file an original *quo warranto* action in the Wisconsin Supreme Court, seeking a determination that Anderson's activities constitute the unauthorized practice of law within the state. The petition was denied, apparently because the court considered such an exercise of original jurisdiction inappropriate.[3] On January 13, 1983, the Wisconsin Supreme Court denied a subsequent petition by the State Bar to amend the court's rules into a form that would have plainly permitted non-lawyers such as Anderson to appear before administrative agencies which allow lay representation.[4]

Anderson and Decade then renewed their action in district court by moving for summary judgment. The

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[2] The individual defendants were subsequently dismissed from the case by stipulation.

[3] In the summary order denying the petition, the court stated that denial was "without prejudice to commencement of the action in some other appropriate forum."

[4] The court, in its order denying this petition, commented that it was not "convinced that the problem of non-lawyer representation in administrative proceedings is of such proportion to warrant adoption of the proposed rule."

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State Bar cross-moved for summary judgment and dismissal of the action on its merits. The court did not grant either of these motions, but instead dismissed the case for want of a justiciable controversy and, alternatively, for want of subject matter jurisdiction. Anderson and Decade appeal from the order of dismissal.

Federal courts established pursuant to Article III of the Constitution do not render advisory opinions. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). The jurisdiction of such courts is accordingly limited to actual cases and controversies. *See Poe v. Ullman*, 367 U.S. 497, 502 (1961); *Muskrat v. United States*, 219 U.S. 346, 354-57 (1911). The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *see* 28 U.S.C. § 2201.

The difference between an abstract question calling for an advisory opinion and a ripe "case or controversy" is one of degree, not discernible by any precise test. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297 (1979). Basically, the question in each case is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.* at 298; *Lake Carriers Ass'n v. McMullan*, 406 U.S. 498, 506 (1972); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).

In actions such as this one, where a plaintiff asks for a declaration that the law of a state violates the federal Constitution, a number of factors govern whether the "substantial controversy" threshold of ripeness has been reached. One is the magnitude of the threat that the challenged law will actually be enforced against the plaintiff. *See, e.g., Babbitt*, 442 U.S. at 298-99; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Lake Carriers*, 406 U.S. at 508; *Poe v. Ullman*, 367 U.S. at 502, 509. Another is the

nature of the consequences risked by the plaintiff if the challenged law should be enforced against him. *Compare Babbitt*, 442 U.S. at 298 (quoting *Steffel*, 415 U.S. at 459) (when contesting constitutionality of *criminal* statute, plaintiff need not first expose himself to actual arrest or prosecution) *with United Public Workers v. Mitchell*, 330 U.S. at 79, 89-90 (challenge to federal statute) (no justiciable controversy presented prior to enforcement proceeding where penalty for violation of allegedly unconstitutional statute was dismissal from employment). Related to this is the question of whether the plaintiff has actually been forced to alter his conduct as a result of the law under attack.[5] *See, e.g., Lake Carriers*, 406 U.S. at 508; *Illinois v. General Electric Co.*, 683 F.2d 206, 210 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1891 (1983); *Nuclear Engineering*, 660 F.2d at 252.[6]

The requirement of "concreteness" necessary for a justiciable controversy is most stringent when, as here, the adjudication would concern the constitutionality of a challenged state law or statute. *See Public Service Commission v. Wycoff*, 344 U.S. 237, 243, 247 (1952); *Alabama State Federation of Labor v. McAdory*, 325 U.S. at 461. This reflects the considered practice of the Supreme Court and other federal courts not to decide any constitutional

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[5] This factor assumes particular importance in a case such as the present one where the plaintiff alleges infringement by a state statute upon his rights protected by the First Amendment, so that his exercise of speech rights may be "chilled" even in the absence of any enforcement action. *See, e.g., Babbitt*, 442 U.S. at 300; *Steffel*, 415 U.S. at 459; *see also Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

[6] Also, in the slightly different context of an action challenging the validity of administrative regulations promulgated under a federal statute, *compare Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (action for pre-enforcement review found ripe where challenged regulations had "direct effect on day-to-day business" of plaintiffs and others) *with Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) (similar challenge unripe where regulations did not produce such "day-to-day" impact).

question in advance of the necessity for its decision. *See Alabama State Federation of Labor v. McAdory*, 325 U.S. at 461. In furtherance of this policy, federal courts will find an action unripe if (1) the factors outlined above do not plainly demonstrate ripeness, (2) the constitutional question will not arise absent further authoritative decision by courts of the state, and (3) the possibility exists that state courts might construe state law in a manner that would avoid the asserted federal constitutional difficulty. *See, e.g., id.* at 460, 462; *Illinois ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 942 (7th Cir. 1983); *see also General Electric*, 683 F.2d at 210.

Our assessment of the present action in the light of all these considerations leads us to agree with the district court that there is here no case or controversy appropriate for adjudication in an Article III forum. The State Bar of Wisconsin has known of Anderson's activities on behalf of Decade for over ten years, yet has undertaken no formal step to institute proceedings designed to compel Anderson to cease these activities. Decade, in arguing to the contrary, points to the fact that the Unauthorized Practice Committee in 1980 recommended commencement of such proceedings. The State Bar has not, however, followed up this recommendation with a proper attempt to trigger the *quo warranto* procedure prescribed by Wis. Stat. § 784.04 (1981). Moreover, under this statute it is normally up to the state attorney general, not the State Bar, to proceed against an allegedly unauthorized practitioner. The attorney general appears to possess substantial discretion in deciding whether to perform this function. *See, e.g., Wisconsin ex rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis.2d 303, 290 N.W.2d 321, 324 n.2 (1980); *State ex rel. City Bank & Trust Corp. v. Marshall & Ilsley Bank*, 4 Wis.2d 315, 90 N.W.2d 556, 560 (1958).

Although the State Bar might ultimately be entitled to pursue an independent *quo warranto* action in the event of the attorney general's refusal to act, *see* Wis. Stat. § 784.04(2), we cannot say that legal action against Ander-

son and Decade is "certainly impending." *Cf. Babbitt*, 442 U.S. at 298; *Steffel*, 415 U.S. at 459. The remoteness of any legal consequences stemming from the underlying dispute in this case between the State Bar and appellants militates against ripeness. For instance, in *General Electric*, 683 F.2d at 210, this court concluded a case was ripe where the prospect of adverse legal action against the putative plaintiff was a "virtual certainty." Contrasted with this situation was that in *Nuclear Engineering*, 660 F.2d at 252-53, in which the case was found unripe because the prospect of adverse action against the plaintiff was merely a "distinct possibility." 683 F.2d at 210.

With respect to the nature of the penalty to be imposed in the event of violation of the challenged law, appellants note that under Wisconsin statutes they could be subject to criminal penalties if found guilty of the unauthorized practice of law. *See* Wis. Stat. § 757.30 (1981). However, appellants cite no case with similar facts in which a criminal sanction was applied. In the case most like that currently at bar, involving the advocacy activities of another non-lawyer before the PSC, neither criminal nor civil penalties were imposed to remedy the violation of the unauthorized practice statute found by the Wisconsin Supreme Court. Instead, the respondent was enjoined from continuing such activities in the future. *State ex rel. State Bar of Wisconsin v. Keller*, 16 Wis.2d 377, 114 N.W.2d 796, 802 (1962), *vacated on other grounds*, 374 U.S. 102 (1963). Thus, while appellants' exposure to criminal prosecution is a theoretical possibility, it does not appear to be a particularly realistic prospect based on the present record.

Appellants have not alleged or shown that the threat of criminal prosecution has caused Anderson to cease, diminish, or otherwise alter his representation of Decade before the PSC. Anderson has known of the State Bar's contention that his activities amount to unauthorized practice for more than ten years. Appellants' exercise of alleged constitutional rights has not been forestalled, nor have their business activities been adversely affected dur-

ing this period by the threat that the State Bar might instigate a *quo warranto* action. This again indicates that the controversy lacks the degree of immediacy requisite for adjudication by a federal court.

In addition, it is uncertain whether the Wisconsin Supreme Court would determine that Anderson's activities on behalf of Decade before the PSC constitute the unauthorized practice of law. To show that the Wisconsin court's position on the issue is settled, appellants cite *Keller*, 114 N.W.2d at 801-02, which held the activities of a non-lawyer in representing a number of clients before the PSC to constitute the unauthorized practice of law, without regard to any PSC rule permitting such lay representation. It is quite possible, however, that the Wisconsin Supreme Court in the circumstances of this case might find *Keller* distinguishable.[7] Under Wisconsin law, authority to define what constitutes the "practice of law" rests exclusively with the Wisconsin Supreme Court as the state's highest judicial organ. *State ex rel. Attorney General v. Dinger*, 14 Wis.2d 193, 109 N.W.2d 685, 690 (1961). That court has approached such questions on a case-by-case basis, with great solicitude for the speech and associational rights that may be affected by its rulings. *See, e.g., Hopper v. City of Madison*, 79 Wis.2d 120, 256 N.W.2d 139, 145 (1977); *Dinger*, 109 N.W.2d at 691-92 (public interest and convenience weighed in determining whether to permit practice challenged by State Bar). Until the Wisconsin courts issue some controlling decision, we would not be justified in concluding that Anderson's ac-

[7] For example, an arguably significant point of distinction is that in *Keller* the lay practitioner represented a number of different clients before the PSC, *see* 114 N.W.2d at 799-800, while in this case Anderson has appeared before the PSC only on behalf of Decade, an entity in which he has always been a managing official. *See id.* at 802 (practice of law consists of giving of legal advice "to clients," preparation "for clients" of documents requiring knowledge of legal principles, and appearance "for clients" before public tribunals).

tivities as stipulated definitely constitute unauthorized practice as a matter of state law.[8] Hence we cannot discount the possibility that the purported controversy concerning the constitutionality of Wisconsin's unauthorized practice law may prove to be nonexistent.

A similar case was presented by *Archer Daniels Midland.* There the Illinois state attorney general, without initiating any state prosecution, had filed a complaint in federal court seeking a declaratory judgment as to whether the Illinois Strikebreakers Act was preempted by sections 7 and 8 of the National Labor Relations Act. 704 F.2d at 938. This complaint alleged that certain employees of a subcontractor of Archer Daniels Midland, the named defendant, "are reputed to be 'strikebreakers' " as defined in the Illinois Strikebreakers Act. This court ruled that no justiciable case or controversy had arisen, and that the requested declaratory judgment would be an impermissible advisory opinion. Noting the uncertainty concerning whether the Illinois Strikebreakers Act would actually apply to the defendant's alleged activities, the court declined in the absence of any prosecution to sanction "a judgment . . . on a constitutional issue . . . that . . . might turn out to have no practical significance to the parties." *Id.* at 942.

The only major difference between the posture of this action and the situation in *Archer Daniels Midland* is that here, it is the prospective state defendants rather than the prospective prosecutor who seek a declaratory judgment on a federal constitutional issue. But the opinion in

[8] Appellants cite the rulings of the Wisconsin Supreme Court in denying review of the State Bar's petition for leave to file an original *quo warranto* action and in denying the State Bar's request for an amendment permitting lay representation before administrative tribunals as evidence that the court considers Anderson's activities to constitute the unauthorized practice of law. The context of these decisions, however, indicates that the question of the propriety of Anderson's activities was not addressed in either instance. *See supra* notes 3, 4.

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Archer Daniels Midland suggests that an action in the present posture would also fail to constitute a justiciable controversy unless the prospective state defendant (and federal plaintiff) had shown that the threat of a prosecution was inhibiting its business or other activities. *Id.* at 942-43 (citing *Nuclear Engineering*, 660 F.2d at 252-53, and *General Electric*, 683 F.2d at 210). As discussed above, appellants have not made such a showing in this action.

The judgment of the district court dismissing the case as unripe for adjudication is affirmed. We do not, therefore, consider other grounds for dismissal cited in the district court's memorandum.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN'S ENVIRONMENTAL DECADE, INC., and PETER ANDERSON

Plaintiffs,

v.

ORDER

STATE BAR OF WISCONSIN, WILLIAM B. ADLER, MICHAEL H. AUEN, C.D. AMBELANG, RICHARD GRIEPENTROG, MARY GREENLEY, JAMES P. GERLACH, GREGORY B. GILL, DeLYLE O. OMHOLT, and CHARLES F. BURROUGHS, individually and as members of the State Bar Unauthorized Practice of Law Committee,

80-C-162

Defendants.

Plaintiffs in this action seek declaratory and injunctive relief against the threatened interference by the defendants, State Bar of Wisconsin (Bar), with their First Amendment rights to associate freely, and to petition the Government for redress of grievances. Specifically, they desire to continue their practice of having the plaintiff Peter Anderson (Anderson), who is not an attorney, represent the interests of the plaintiff Wisconsin's Environmental Decade (Decade) in quasi-judicial proceedings before the Wisconsin Public Service Commission (Commission).

I. Background

Anderson has represented the Decade in quasi-judicial proceedings before the Commission since at least 1972. The Decade is a non-stock, not-for-profit membership corporation, of which Anderson was a co-founder, formed for the purpose of protecting and enhancing the quality of the environment. In his capacity as a Decade director and staff member, Anderson has represented the Decade in excess of fifty quasi-judicial proceedings before the Commission, which required the preparation of written memoranda and petitions, the conduct of direct and cross-examination, and oral arguments on questions of fact and law. The Commission has a rule specifically authorizing lay representation, Wis. Admin. Code § PSC 2.32 (1982), and a long-standing practice permitting such representation.

The Bar, created by the Wisconsin Supreme Court, is charged under Art. IV, §10 of its By-Laws with the prevention of unauthorized practice of law by lay persons. Under §784.04 of the Wisconsin Statutes, the Attorney General, acting on the relation of the Bar, is authorized to bring a *quo warranto* action in State Court to enjoin the unpractice of law. A lay person adjudged guilty of the unauthorized practice of law is liable for costs, and may be fined a sum not exceeding two thousand dollars. Wis. Stat. §784.13 (1982). In addition, engaging in the unauthorized practice of law is a criminal offense under §757.30 of the Wisconsin Statutes, and can constitute contempt of court under §785.01, subjecting a violator to additional fines and imprisonment.

Although the Bar's Unauthorized Practice of Law Committee took the position as early as September, 1973 that Anderson's activities before the Commission constituted

the unauthorized practice of law, the Bar's Board of Governors took no action until a lawsuit brought against the Bar and others by Anderson and the Decade was dismissed on August 29, 1978. An investigation of lay practices before State administrative agencies was thereafter conducted, culminating in a report suggesting that legal action be brought against Anderson and others for unauthorized practice of law. The Board of Governors approved the Committee's recommendation on March 8, 1980, and directed that the matter be referred to the Attorney General for further action with the request that the Attorney General give Anderson reasonable notice of the contemplated action.

On April 14, 1980, before the Attorney General brought suit, the Decade and Anderson filed this action. Plaintiffs seek a declaration that Wisconsin's unauthorized practice rules as applied to their activities before the Commission violate their First Amendment rights to associate together and to petition the Government for redress of grievance, and an injunction prohibiting the defendants from attempting to enforce any such unauthorized practice rules. In answering the complaint, the Bar alleged as an affirmative defense that the Court should abstain pending determination in state court of state law issues related to the constitutional dispute.

On April 3, 1981, the parties entered into a stipulation in this action, staying all proceedings herein until an agreed-upon petition, exhibits, and stipulation of facts were filed with the Wisconsin Supreme Court, asking that Court to accept the petition as an original matter and to determine whether plaintiffs' activities constituted the unauthorized practice of law under the laws of Wisconsin. The Court denied the petition without prejudice to com-

mence "the action in some other appropriate forum." *State of Wisconsin on the Relation of the State Bar of Wisconsin v. Wisconsin's Environmental Decade, Inc. and Peter Anderson,* No. 81-866-OA, slip op. at 1 (Wis. June 8, 1981).

Subsequently, on April 19, 1982, the Bar filed another petition with the Wisconsin Supreme Court, asking that Court to amend Wis. Ad. Code §SCR 10.03 (1982), as it related to appearances by persons other than members of the Bar in administrative proceedings. The proposed amendment explicitly permitted lay persons to function in a representative capacity before administrative agencies, but subjected such representatives to regulation, including parts of Code of Professional Responsibility. Oral argument was held on August 31, 1982, and the Court entered an order denying the petition on January 19, 1983.

Plaintiffs have moved this Court for summary judgment, and defendants have cross-moved for summary judgment. Federal Courts are courts of limited jurisdiction, however, and are obligated always to ascertain whether they have jurisdiction over the litigation before them, even when the parties prefer to ignore the question. Where, as here, the parties fail to discuss jurisdiction, the Court must raise the issue *sua sponte. Mansfield, Coldwater & Lake Michigan Ry., Co. v. Swan,* 111 U.S. 379 (1884). The Court finds that it has not been presented with a justiciable controversy and, alternatively, that it lacks subject matter jurisdiction. Accordingly, the complaint must be dismissed.

II. Ripeness

The Declaratory Judgment Act, 28 U.S.C. §2201 (1982), allows the Court, in its discretion, to render declaratory judgments only where there exists an "actual controversy;" the latter requirement is a "jurisdictional prerequisite of constitutional dimensions." *Grafton Corp. v. Hausermann,* 602 F.2d 781, 783 (7th Cir. 1979); *Crown Drug Co., Inc. v. Revlon, Inc.,* 703 F.2d 240, 242-243 (7th Cir. 1983). The test to be applied in the context of a declaratory judgment action to determine the existence of an "actual controversy" is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941).

Jurisdictional matters are determined by reference to the time of the filing of the action. *International Harvester Co. v. Deere & Co.,* 623 F.2d 1207, 1210 (7th Cir. 1980). At the time plaintiffs filed their complaint, the alleged controversy between them and the defendants was based entirely on the Bar's letter, dated March 13, 1980, notifying Anderson of its intent to refer its finding that his conduct amounted to the unauthorized practice of law to the Attorney General for action, and Anderson's letter in reply, dated March 21, 1980, advising the Bar of plaintiffs' intention to file this suit. Anderson's letter also set forth plaintiffs' understanding that if this suit was timely filed, the Bar would not proceed against them while an action was pending in Federal Court.

> Of course, a plaintiff need not always await the actual commencement of enforcement proceedings to challenge the authority under which those proceedings would be brought. However, for

> such an action to present a justiciable controversy the threat of enforcement must have immediate coercive consequences of some sort upon the plaintiff.

Nuclear Engineering Co. v. Scott, 660 F.2d 241, 252 (7th Cir. 1981) (citations omitted).

The Decade has not alleged that the Bar's threatened action is causing it immediate consequences of any kind.

> Plaintiffs do not allege that Anderson has been denied access to PSC proceedings, that his appearances before the agency have been restricted, or that public support for the Decade has diminished as a result of the Bar's contention that Anderson is engaging in the unauthorized practice of law. If plaintiffs intend to imply that the State Bar's actions have caused, and threaten to cause, the PSC to respond less favorably to the contentions Anderson presents to it, the allegation is too conclusory and speculative.

Wisconsin's Environmental Decade, Inc. and Peter Anderson v. State Bar of Wisconsin, et al., No. 77-C-184, slip op. at 9, 10 (W.D.Wis. August 29, 1978)(Doyle, J.) (granting Bar's motion to dismiss on ground that controversy not ripe).

The facts of this case are remarkably similar to those in *Nuclear Engineering, supra.* In that case, the Attorney General of Illinois announced at a press conference that he intended to sue Nuclear Engineering Company for violating Illinois' environmental laws. A few days after the press conference, the company brought suit in Federal Court, alleging that the Illinois law in question could not constitutionally be applied to its facility. The Seventh Circuit held

that the threat of enforcement did not create an "actual controversy" between the company and the State.

> As in this case, the company argued that it had not violated state law. If so, the Attorney General might not carry out his threat to sue, and if he did sue his suit would fail on state law grounds. In either case the federal issue would never be reached, and this gave the company's suit the character of a request for an advisory opinion. To establish jurisdiction the company would have had to show that the threat of suit was inhibiting its activities, as by driving away investors or customers, and it did not. 660 F.2d at 252.

People of State of Ill. v. Archer Daniels Midland, 704 F.2d 935, 942-43 (7th Cir. 1983).

Nor, as in this case, could the company allege that state officials were actively employing the threat of future enforcement to obtain current compliance with their interpretation of the statute in question, since the company continued to operate its facility as it always had, despite the wishes of the pertinent state officials to the contrary. *Nuclear Engineering Co. v. Scott,* 660 F.2d at 253.

Just as in this case, the "company was asking the federal court for an advisory opinion that if Illinois law were construed — incorrectly in the company's view — in such a way as to force it to close its hazardous waste facility, the state would be violating the Constitution." *People of State of Ill. v. General Elec. Co.,* 683 F.2d 206, 210 (7th Cir. 1982).

Finding the cases indistinguishable, *Nuclear Engineering* is controlling, and the Court must dismiss the complaint because it fails to satisfy the "actual controversy" re-

quirement of the Declaratory Judgment Act, and the "case or controversy" requirement of Article III of the Constitution of the United States.

III. Subject Matter Jurisdiction

Even if the Court were presented with a justiciable controversy, it lacks jurisdiction for want of a claim "arising under" federal law, because the Decade's constitutional claims are without meaning except insofar as they constitute defenses to state law claims.

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not of the defense,* which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952) (emphasis added) (dictum).

"The principles embodied in the *Wycoff* dictum . . . remain viable" in the Seventh Circuit. *Nuclear Engineering Co. v. Scott,* 660 F.2d at 253-254, n.17 (dictum). *See Precision Shooting Co. v. Allen,* 646 F.2d 313, 315 (7th Cir. 1981); *Milprint, Inc. v. Curwood, Inc.,* 562 F.2d 418, 421-22 (7th Cir. 1979). *But cf. People of State of Ill. v.*

General Elec. Co., 683 F.2d at 211 ("if understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong") (dictum).

It is clear that the threatened state court action here was based on alleged violation of state rather than federal law. The Decade's claims implicate federal law — the United States Constitution — only to the extent that the Constitution affords the Decade a defense to the threatened cause of action. Consequently, plaintiffs' complaint presents no claim that "arises under" federal law, and must be dismissed. *See Nuclear Engineering Co. v. Scott*, 660 F.2d at 254.[1]

Accordingly:

ORDER

IT IS ORDERED that plaintiffs' complaint is DISMISSED with prejudice and without costs.

Entered this 20th day of July, 1983.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

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[1] "We find it insignificant that NEC also seeks injunctive relief. NEC's claim for injunctive relief is entirely premised upon the success of its claim for declaratory relief, seeking only to give effect to the declaratory relief sought." *Id.* at n.18.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN'S ENVIRONMENTAL DECADE, INC., and PETER ANDERSON,	)	
Plaintiffs,	)	
v.	)	Filed Aug. 29, 1978
STATE BAR OF WISCONSIN, WARREN H. RESH, Individually and as Special Counsel to the State Bar of Wisconsin, JOHN B. McCARTHY, individually and as Grievance Administrator of the State Bar of Wisconsin, DeLYLE OMHOLT, individually and as Chairman of the Unauthorized Practice of Law Committee of the State Bar of Wisconsin, RODNEY O. KITTELSEN, GEORGE K. STEIL, JACK R. DEWITT, DON R. HERRLING, JOHN L. BRUEMMER, TRUMAN McNULTY, MYRON E. LAROWE, and JOHN H. BOWERS, individually and as Members of the Executive Committee of the Board of Governors of the State Bar of Wisconsin,	)	OPINION AND ORDER 77-C-184
Defendants.	)	

This is an action for declaratory and injunctive relief to prevent defendants from interfering, or threatening to interfere, with plaintiffs' First and Fourteenth Amendment rights by enforcing against them Wisconsin prohibitions against the unauthorized practice of law. The action arises under 42 U.S.C. §1983, and jurisdiction is premised upon 28 U.S.C. §1343.

Pending before the court are two motions. First, defendants have moved to dismiss the complaint on the grounds that the State Bar is not a "person" under §1983, that all defendants are immunized from suit by the Eleventh Amendment, and that the complaint fails to state a claim upon which relief can be granted. In the alternative, defendants urge the court to find that the controversy is not ripe for decision or to abstain from deciding the merits of plaintiffs' claims until the Wisconsin Supreme Court has determined whether plaintiffs' activities should be prohibited as the unauthorized practice of law. Second, plaintiffs have filed a motion for summary judgment on Count I of the complaint.

DEFENDANTS' MOTION TO DISMISS

1. Applicability of §1983 to the State Bar

Defendant State Bar contends that it is not a "person" within the meaning of §1983. A similar argument was rejected by this court in *Stebbins v. Weaver,* 396 F.Supp. 104 (W.D. Wis. 1975), *aff'd* 537 F.2d 939 (7th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977). Although other circuits have held various state agencies to be beyond the reach of §1983, the law of the Seventh Circuit is to the contrary. In *Lee v. Board of Regents of State Colleges,* 441 F.2d 1257 (7th Cir. 1971) and *Roth v. Board of Regents of State Col-*

leges, 310 F.Supp. 976 (W.D. Wis. 1970), *aff'd* 446 F.2d 806 (7th Cir. 1971), *rev'd on other grounds,* 408 U.S. 564 (1972), the board of regents, a state agency, was held to be a "person" under §1983 where declaratory or injunctive relief is sought. And in *Hill v. Trustees of Indiana University,* 537 F.2d 248 (1976), the Seventh Circuit refused to address the issue despite an ardent concurring opinion that a state university board should be excluded from the coverage of §1983.

The State Bar argues that *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), which held that municipal corporations are not vulnerable to suit for equitable, as well as legal, relief under §1983, mandates an overruling of *Lee* and *Roth.* The Bar's argument is severely undercut by the recent Supreme Court decision in *Monell v. New York City Department of Social Services,* No. 75-1914, decided June 6, 1978. Although the Court refused to comment on *Monell's* affect on *Bruno,* slip opinion at 41 n. 66, it seems clear that *Bruno* has been overruled implicitly by the holding in *Monell* (at 30-31) that: "local government units . . . can be sued directly under §1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."

2. Eleventh Amendment

The State Bar and the individual defendants claim that the Eleventh Amendment to the United States Constitution bars the present suit against them in federal court. The Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equi-

> ty, commenced or prosecuted against one of the United States by citizens of another state. . . .

Although on its face the Amendment is limited to actions maintained by noncitizens of the defendant state, Eleventh Amendment immunity consistently has been applied to suits against an unconsenting state by its own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890); *Duhne v. New Jersey,* 251 U.S. 311 (1920); *Parden v. Terminal Railroad Co.,* 377 U.S. 184 (1964); *Employees v. Department of Public Health and Welfare,* 411 U.S. 279 (1973); and *Edelman v. Jordan,* 415 U.S. 651 (1974).

A lawsuit may be precluded by the Eleventh Amendment where, although not a party of record, the state is "the real, substantial party in interest." *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464 (1945). Where a state agency operates as an arm, or alter ego, of the state, the agency enjoys the protection of the Eleventh Amendment. Whether a state agency is to be treated as the state for purposes of federal court immunity depends, in part, upon the nature of the entity created by state law. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 280 (1977); *see also* Wright and Miller, 13 *Federal Practice and Procedure,* §3524 at 89 (1975 ed.).

Although created by Wisconsin Statutes §275.25, the State Bar is financially independent of the Wisconsin State treasury. The State Bar is supported by the dues of its members, not by appropriations from the State. See Wis. Stat. §256 Appendix, State Bar Rule 5, section 5. Aside from the plenary power exercised by the Wisconsin Supreme Court, there is no state supervision of the State Bar's fiscal or other affairs. *Id.,* State Bar Rule 3, section 2; Rule 4, section 4; Rule 5, section 2; Rule 11.

Moreover, under Wisconsin case law, the State Bar is neither an arm nor an alter ego of the State. In Wisconsin a suit against a state agency is deemed to be a suit against the state unless the legislature has endowed the agency with independent proprietary powers or functions, *Majerus v. Milwaukee County,* 39 Wis.2d 311 (1968), or has waived its sovereign immunity under Article 4, section 27, of the Wisconsin Constitution.[1] The State Bar possesses independent proprietary powers and has waived its sovereign immunity. Wis. Stat. §256, App., State Bar Rule 1, section 1.

The conclusion that the State Bar is not constitutionally protected from suit in federal court forecloses the possibility that as officers of the State Bar, the individual defendants are shielded by the Eleventh Amendment. Independent of the ruling on the State Bar's immunity, the claims of the individual defendants must be rejected. Under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), the Eleventh Amendment does not defeat a suit against a state officer where, as here, prospective injunctive relief is requested against the allegedly unconstitutional conduct of the officer. *Edelman v. Jordan, supra; Scheuer v. Rhodes,* 416 U.S. 232 (1974).

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[1]The cases cited by the defendants for the proposition that the Bar is not an independent state agency impliedly support the opposite conclusion. In *Sullivan v. Board of Regents of Normal Schools,* 209 Wis.2d 242 (1932), *Metzger v. Department of Taxation,* 35 Wis.2d 119 (1967), *Townsend v. Wisconsin Desert Horse Ass'n.,* 42 Wis.2d 414 (1968), and *Appel v. Halverson,* 50 Wis.2d 230 (1971), the state agencies could not be considered independent of the state because they lacked sufficient fiscal autonomy, proprietary powers, or capacity to sue and be sued.

3. Ripeness

In the complaint, it is alleged that Wisconsin's Environmental Decade, Inc. is a nonprofit membership corporation whose purpose is to protect and enhance the Wisconsin environment; that plaintiff Peter Anderson is founder, director, officer, and member of the Decade; that since March 2972 [sic] on behalf of the Decade, Anderson has participated in numerous proceedings before the Public Service Commission (PSC) of Wisconsin by drafting and filing petitions and memoranda on proposed PSC actions, and, as an intervenor in PSC hearings, by presenting direct testimony and cross-examining witnesses; that Anderson is not a lawyer and is not licensed to practice law in Wisconsin; and that since September 24, 1972 [sic], the State Bar of Wisconsin has interfered with the ability of plaintiffs to participate effectively in PSC proceedings by stating to both the PSC and the Attorney General that Anderson's activities before the PSC constitute the unauthorized practice of law and by stating that unless Anderson ceases his participation in PSC proceedings the Bar will commence a *quo warranto* action against him for engaging in the unauthorized practice of law.

A nonevidentiary hearing on plaintiffs' motion for a preliminary injunction has been held. At the close of that hearing, counsel for defendants made the following representations to this court:

(1) that when finances permit, the State Bar intends to look into the entire phenomenon of nonlawyers appearing in representative capacities at state administrative proceedings;

(2) that when this study has been completed and the State Bar has analyzed its findings, the State Bar will

decide that Anderson's activities before the PSC either are not the kind of conduct which the State Bar wishes to challenge or are the kind of conduct which the State Bar wishes to challenge by seeking a declaratory judgment in state court;

(3) that if the State Bar decides to seek a declaratory judgment from the state courts, the State Bar will give the plaintiffs reasonable notice of its intention so that plaintiffs will have an opportunity to return to this court to seek preliminary injunctive or other relief.

Defendants contend that the present request for declaratory and injunctive relief is not ripe for adjudication for two reasons: first, the Bar may decide not to charge plaintiff Anderson with the unauthorized practice of law and, second, the Wisconsin Supreme Court may decide that activities such as those undertaken by Anderson before the PSC do not fall within the proscription against the unauthorized practice of law.[2]

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[2]Defendants' contention that the Wisconsin Supreme Court may interpret the unauthorized practice of law regulation in a manner which would not prohibit Anderson's appearances before the PSC suggests that the existence of legal contingencies should preclude adjudication of plaintiffs' claim in federal court. In constitutional challenges to uncertain state laws, a federal court may refuse to exercise its jurisdiction where the opportunity for clarification by state courts exists. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Although sometimes considered in a ripeness calculation, deference to state court construction of state law is more appropriately evaluated under the *Pullman* doctrine of abstention. In such cases, the obstacle to judicial intervention is not the lack of a substantial and immediate controversy. Rather, it is the policy of comity inherent in the concept of federalism that demands postponing the exercise of federal jurisdiction. Since I decide defendants' motion to dismiss on the issue of ripeness, I do not address their argument for abstention.

Arising from the case and controversy requirement of Article III, the ripeness doctrine addresses the timing of a lawsuit. The doctrine is designed to prevent ill-advised decisions and to conserve judicial resources by avoiding premature adjudications. The test for assessing ripeness echoes the requirements for a declaratory judgment:

> [T]he question in each case is whether * * * there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972), quoting *Maryland Gas Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941). Two inquiries are most pertinent to a ripeness determination: (1) whether there are contingencies or uncertainties in the facts which, if clarified, might alter the resolution of the dispute or make its decision unnecessary; and (2) whether the present hardship caused the plaintiff by the challenged policy or practice requires adjudication of the case. In short, the question of ripeness demands a balancing of the need for judicial intervention and the suitability of the issue for present review. *Poe v. Ullman,* 367 U.S. 497, 508-09 (1961); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967).

Defendants' representation that the State Bar may decide not to charge Anderson with the unauthorized practice of law suggests that factual uncertainties may make judicial resolution of this case unnecessary. Threatened enforcement, as opposed to actual enforcement, of an allegedly unconstitutional statute or policy may present a controversy ready for adjudication so long as the threat is substantial, genuine, and imminent. *Steffel v. Thompson,* 415 U.S. 452, 459 (1974). In this respect, plaintiffs' claim

is deficient. Although the complaint alleges that the State Bar adheres to the view that Anderson's appearance before the PSC on behalf of the Decade constitutes the unauthorized practice of law, the representations made by defendants' attorney eliminate the immediacy of the threat of civil or criminal proceedings by the State Bar against Anderson.[3]

Aside from the threat of civil or criminal sanctions, shown not to be immediate, the complaint alleges that the State Bar's actions interfere with plaintiffs' ability to pursue their environmental interests by stigmatizing their conduct as unlawful and by reducing the effectiveness of Anderson's representation. Plaintiffs do not allege that Anderson has been denied access to PSC proceedings, that his appearances before the agency have been restricted, or that public support for the Decade has diminished as a result of the Bar's contention that Anderson is engaging in the unauthorized practice of law. If plaintiffs intend to imply that the State Bar's actions have caused, and threaten to cause, the PSC to respond less favorably to the contentions Anderson presents to it, the allegation is too conclusory and speculative.

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[3]This representation should assuage plaintiffs' fear that, in the event of state court proceedings, further federal court consideration of their claim would be foreclosed by *Younger v. Harris,* 410 U.S. 37 (1971) and its progeny, particularly, *Huffman v. Pursue Ltd.,* 420 U.S. 592 (1972); *Hicks v. Miranda,* 422 U.S. 332 (1975); and *Doran v. Salem Inn,* 422 U.S. 922 (1975). A declaratory judgment may not fall within the boundaries of the *Younger-Huffman* doctrine. However, assuming that *Younger-Huffman* would otherwise apply, the commencement of state proceedings against Anderson for his allegedly unauthorized practice of law before the PSC, without adequate notice to plaintiffs, may well present a case of bad faith on the part of defendants and thus remove the *Younger-Huffman* bar.

Therefore, I find that plaintiffs' claims are not ripe for decision.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT I

Because this action must be dismissed for lack of ripeness, I am precluded from entertaining plaintiffs' motion for summary judgment.

ORDER

Accordingly, it is hereby ordered that defendants' motion to dismiss on the ground that the controversy is not ripe, is granted.

Entered this 29th day of August, 1978.

BY THE COURT:

/s/ James E. Doyle
District Judge

APPENDIX D

OPINION BY JUDGE WEIGEL

JUDGMENT – ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 30, 1984.

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. STANLEY A. WEIGEL, Senior District Judge*

WISCONSIN'S ENVIRONMENTAL DECADE, INC. and PETER ANDERSON, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 83-2582 vs.	)	No. 80 C 162 Judge John Shabaz
STATE BAR OF WISCONSIN, Defendant-Appellee.	)	

This cause was heard on the record from the United States District Court for the Western District of Wisconsin and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 17, 1984.

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. STANLEY A. WEIGEL, Senior District Judge*

WISCONSIN'S ENVIRONMENTAL DECADE, INC. and PETER ANDERSON, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin. No. 80 C 162-S John C. Shabaz, Judge.
No. 83-2582 vs.	)	
STATE BAR OF WISCONSIN, Defendant-Appellee.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiffs-Appellants Wisconsin's Environmental Decade, Inc., and Peter Anderson, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

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*The Honorable Stanley A. Weigel, Senior Judge of the United States District Court for the Northern District of California, is sitting by designation.